IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 215.

BOARD OF TRADE OF THE CITY OF CHICAGO, *Appellant,* vs. HAMMOND ELEVATOR COMPANY AND WESTERN UNION TELEGRAPH COMPANY, *Appellees.*	Appeal from the Circuit Court of the United States, for the Northern District of Illinois.

STATEMENT.

This is an appeal directly to this court from a decree of the Circuit Court dismissing the suit for want of jurisdiction of the appellee Hammond Elevator Company.

The bill was originally filed by appellant against that company alone. It alleged that appellant has a property right in the quotations of prices in transactions made within its exchange hall, that the Hammond Company had entered into a conspiracy with others to steal, and was using such, quotations, and prayed that it be enjoined from doing so.

The return of the subpoena shows service upon the Hammond Company by the delivery of copies thereof to one Babb, and to each of the firm of Battle & Dickes, as its agents. (Rec., 20.)

Thereupon the Hammond Company, appearing specially for that purpose, moved to set aside the service on the ground that it was a Delaware corporation and at no time since the filing of the bill was it doing business or had it any agents within the district or the State of Illinois, nor was it a resident thereof. (Rec., 22.)

The master, to whom this motion was referred to take the evidence and report the same with his conclusions, made a lengthy report (Rec., 217-227), in which he found that the Hammond Company was not, at the time of the service of process, doing business in Illinois, so as to subject it to service of process there, and that neither Babb, Battle nor Dickes was such agent of defendant that the service of process was sufficient, and recommended that the motion to quash service be sustained. To this report appellant filed sundry exceptions. (Rec., 237-240.)

Appellant also amended its bill, so as to make the Western Union Telegraph Company a co-defendant (Rec., 228), and filed a supplemental bill (Rec., 230) averring that, since the original bill, the Hammond Company had instituted in a state court in Indiana an action of *mandamus* against the Western Union Telegraph Company to compel it to furnish that company with these quotations in violation of appellant's contract with such telegraph company providing for a restricted distribution of such quotations. The

amended bill also prayed that the Hammond Company be enjoined from obtaining, or enforcing, or receiving the quotations under, and the Telegraph Company from complying with, any judgment rendered in that cause.

The Circuit Court overruled all of the exceptions, confirmed the master's report, granted the motion to quash, and—counsel for appellant admitting that it was unable to make any other or different service on the Hammond Company—dismissed the bill as to that company.

Subsequently at the same term the court entered a final decree which, after reciting that, "it appearing to the court that it has not acquired and cannot acquire jurisdiction of the person of the defendant Hammond Elevator Company, * * * and that it is not practicable to proceed herein without the presence of" that company, directed that said suit be dismissed also as to the Western Union Telegraph Company at complainant's costs, without prejudice, etc. (Rec., 244.)

Thereupon appellant presented its petition for appeal to this court "upon the said question of jurisdiction for the reasons specified in the assignments of errors," and praying that the appeal be allowed and said question certified to this court. Assignments of error, contemporaneously filed, relate exclusively to the question of jurisdiction. (Rec., 244-6.)

The Circuit Court allowed this appeal "upon the question of the jurisdiction of this court over the person of the defendant Hammond Elevator Company, as prayed," etc. (Rec., 248.)

At the same time the trial judge signed and filed a

certificate, reciting that in pursuance to the 5th section of the Act of March 3, 1891, he certified "that in the above entitled cause the jurisdiction of this court of the person of the defendant Hammond Elevator Company was in issue, and was decided adversely to the complainant, and that by reason thereof, and not otherwise," the order dismissing the suit as to the Hammond Elevator Company and the final decree were entered. (Rec., 247.)

This certificate also contains the following questions:

"I. Whether, by the service of subpoena, as shown by the record herein, upon either A. H. Babb, John L. Dickes, or Charles S. Battle, as agent of the defendant Hammond Elevator Company, this court acquired jurisdiction of the person of the defendant Hammond Elevator Company.

II. Whether, under the facts shown by the evidence taken on that issue, the defendant Hammond Elevator Company, was, at the time of the service of subpoena herein, either on said A. H. Babb, Charles S. Battle, or John L. Dickes, within the northern district of Illinois, so as to be brought within the jurisdiction of this court in this case by service of said process upon either said Babb, said Battle or said Dickes.

III. Whether the service of a subpoena upon either said Babb, said Battle, or said Dickes, as shown herein, was, under the evidence herein, a legal service of process herein upon the defendant Hammond Elevator Company, so as to vest in this court jurisdiction herein of the person of the defendant Hammond Elevator Company.

IV. Whether, at the time of the service of subpoena herein upon him, either A. H. Babb, or John L. Dickes, or Charles S. Battle, was, under the evidence, the agent of the defendant Hammond Elevator Company in the sense, or to the extent, that service upon him was a legal service of subpoena herein upon the Hammond Elevator Company."

I.

THIS RECORD PRESENTS A QUESTION OF JURISDICTION WITHIN SECTION 5 OF THE ACT OF 1891.

That section provides that appeals shall lie directly to this court "in any case in which the jurisdiction of the court was in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

"Jurisdiction" is a word of different meanings. In one sense a court of chancery has no jurisdiction, where there is a remedy at law; but, as under the federal judicial system the *same* court has jurisdiction of equity and common law cases, this objection really is, not that the court, as such, has no jurisdiction at all, but that the suit is on the wrong side of the court. So a court is said to be without jurisdiction, where another court has previously taken jurisdiction.

But in these cases the court is required to decide whether, in the one case, the remedy at law is adequate, and in the other, which court did first get jurisdiction, and its decision binds the parties.

In these and like cases no question of jurisdiction is involved within the meaning of section 5.

Smith v. *McKay*, 161 U. S., 355.
Blythe v. *Hinckley*, 173 U. S., 501.
Ill. Cen. R. R. Co. v. *Adams*, 180 U. S., 28.
Bache v. *Hunt*, 193 U. S., 523.
Louisville Trust Co. v. *Knott*, 191 U. S., 225.

In a more restricted sense, jurisdiction

means *the power to decide.* Without this any judgment is subject to direct or collateral attack as an absolute nullity. Jurisdiction of this kind is two-fold: (1) of the subject-matter, and (2) of the person. If either is wanting, there is no jurisdiction.

It is in this sense that "jurisdiction" is used in section 5.

O'Neal v. *United States,* 190 U. S., 36.

Thus confining "jurisdiction"—this court by section 5 is required to review upon direct appeal or writ of error, "*any* case in which the jurisdiction of the court is in issue." This is but a re-assertion of the policy of the Act of February 25, 1889, which provided for writs of error and appeals to this court, upon the question of jurisdiction without reference to the amount involved.

The reason for these enactments doubtless was the importance of the question of jurisdiction, and the serious consequences that might arise, should the Circuit and District Courts, from a mistaken view of their power, enter, and act under, judgments that were in fact nullities.

Hence, this court has uniformly upheld its jurisdiction to review, upon direct appeal or writ of error under section 5, *any* question of jurisdiction—whether of the subject-matter;

Wetmore v. *Rymer,* 169 U. S., 115.
Huntington v. *Laidley,* 176 U. S., 668.
Interior Construction Co. v. *Gibney,* 160 U. S., 217.

or of the person of the defendent.

Shepard v. *Adams*, 168 U. S., 618.
Societe Fonciere v. *Milliken*, 135 U. S., 304.
Coniey v. *Mathieson Alkali Works*, 190 U. S., 406.
Goldey v. *Morning News*, 156 U. S., 518.

Conversely the Circuit Courts of Appeals decline to entertain such cases.

St. Louis Compress Co. v. *American Co.*, 125 Fed., 196; 60 C. C. A., 80.

Some little uncertainty seems to have arisen at first from the phrase of that section "in such cases the question of jurisdiction alone shall be certified."

The Act of April 29, 1802, provided (Ch. 31, Sec. 6):

"That whenever *any question* shall occur before a circuit court, upon which the opinions of the judges shall be opposed, the *point* upon which the disagreement shall happen, shall, during the same term, upon the request of either party, or their counsel, *be stated* under the direction of the judges, and certified under the seal of the court, to the supreme court, at their next session to be held thereafter; and shall, by the said court, be finally decided."

This language was subsequently re-enacted into section 652 of the Rev. Stat., Act of June 1, 1872.

The peculiar wording of these provisions required the question certified upon a disagreement of the judges to be a single and specific question of law, and not questions of fact, and the certificate was required to state the facts or parts of the record necessary to properly present that question. (*California Paving Co.* v. *Molitor*, 113 U. S., 609.) The certificate was the only record in this court and was required to be

complete in itself, subject to the rights of this court to order up the record itself.

At first the expressions of this court seemed to indicate that Section 5 of the Act of 1891 contemplated this kind of a certificate. (*Maynard* v. *Hecht*, 151 U. S., 324.)

But later a difference was noted between requiring a certificate, which should state the question to be decided and all of the case that was necessary to decide it, and one whose only purpose was to establish a fact, upon which this court's jurisdiction depended.

That Congress by section 5, contemplated only a certificate of the second kind is apparent from the requirement that "*any* case in which the jurisdiction of the court is in issue," should be reviewable by this court. If a certificate of the character required under the old law were insisted upon, *all* such cases would not be reviewable here, because under that kind of a certificate questions of jurisdiction involving a question of fact, or a mixed question of law and fact, could not be certified.

Note here also that section 6 authorizes a Circuit Court of Appeals to certify to this court "any questions or propositions *of law*" upon which it desires instruction. Rule 37 of this court covers only certificates under section 6, and provides that they "shall contain a proper statement of the facts on which such question or proposition of law arises," thus making them substantially like certificates under the old law, and also recognizing a distinction between such certificates and those under section 5.

Undoubtedly Congress, in requiring by section 5

the question of jurisdiction to be certified, realized that in some cases—where, for instance, a want of jurisdiction and a defense to the merits were simultaneously pleaded and there was a general judgment for defendant—it would, without some kind of a certificate, be difficult to determine when the question of jurisdiction had really been the controlling issue. To meet this difficulty the Act of 1891 exacts from the trial judge a certificate *of the fact* that the case had turned on the question of jurisdiction.

Hence, this court, under section 5, has not only reviewed jurisdictional cases involving questions of fact, and of mixed law and fact,

Wetmore v. *Rymer*, 169 U. S., 115.
Conley v. *Mathieson Alkali Works*, 190 U. S., 406.
Geer v. *Same*, *id.*, 428.

but has also held that there need not in some cases be any certificate at all; but that the question may appear either "by the terms of the decree appealed from and of the order allowing the appeal, or by a separate certificate of the court below"; and that, where the judgment was for defendant upon a preliminary defense of a want of jurisdiction,—the question of jurisdiction being thus the only one involved,—and the appeal is allowed upon this question alone, no certificate is necessary.

United States v. *Jahn*, 155 U. S., 109.
In re Lehigh Min. & Mfg. Co., 156 U. S., 322.
Shields v. *Coleman*, 157 U. S., 168.
Interior Construction Co. v. *Gibney*, 160 U. S., 217.

Smith v. *McKay*, 161 U. S., 355.
Huntington v. *Laidley*, 176 U. S., 668.
Excelsior Co. v. *Pacific Co.*, 185 U. S., 282.
Arkansas v. *Schlierholz*, 179 U. S., 598.
Courtney v. *Pradt*, 25 Sup. Court Rep., 208 (decided January 3, 1905.)

This record, as already shown, more than meets the requirements of these cases, as respects the certification of the question of jurisdiction.

II.

THE SERVICE OF PROCESS SHOWN BY THE RECORD WAS ADEQUATE.

First. It is here essential to refer to *the facts* somewhat in detail, in order to understand the character of the business of the Hammond Company and the relation to it of the persons served.

It is a Delaware corporation, engaged in the business of making "trades" in stocks and grain, and in order to gather business from persons living in Illinois (Rec., 223) it has adopted the following plan: It leases from appellee telegraph company wires running from the Hammond Company's office at Hammond, Indiana, to certain offices in ten or twelve different cities in Illinois, including Peoria and Aurora. (Rec., 38, 218.) Each of these leases gives the Hammond Company the exclusive use of the leased wire during business hours (Rec., 218), and states as the termini of such wire the office of the lessee company at Hammond and *its* office in the Illinois city.

(Rec., 218.) Each lease calls for a fixed rental, which is paid by the *Hammond Company.* (Rec., 218.)

The Hammond Company also enters into an arrangement with a person located in the Illinois city (called its "correspondent"), which contemplates an office in that city in charge of such person, and the transmission by the Hammond Company to him, over this leased wire, during the market hours of the New York Stock Exchange each day of the continuous market quotations of that exchange, covering about 60 different stocks, which quotations are posted upon a blackboard in this office as soon as received. (Rec., 115, 116, 219.) Appellant's quotations are also sent over this wire (Rec., 38), but are not posted.

When by the display of these quotations and otherwise persons resorting to these offices are stimulated to make "trades," the correspondent receives the orders, numbers them consecutively, and transmits them in a message over this wire to Hammond for the company's acceptance. (Rec., 223.) Sometimes the price is mentioned by the customer, and sometimes it is not. In the latter case it is understood that the trade is proposed to be made at whatever the market then is. (Rec., 219.)

Upon receipt of the telegram in Hammond a clerk of this company looks at a book, in which these quotations are also written, "to find out what the market is," and he usually "fills" the order by marking that price upon the telegram, and this is reported back over the wire to the correspondent. (Rec., 41.) Upon the receipt of this return message the telegraph operator in the Illinois office, from a

clock there, marks upon the telegram the then exact time of day "as the time when the order was filled". (Rec., 120, 121.) The correspondent then notifies the trader of the acceptance of the trade. (Rec., 219.) Until the return message is received, the transaction is not entered upon the correspondent's book (Rec., 122, 123); nor until then is the order considered by the correspondent as a trade. (Rec., 84.) The correspondent, upon the receipt of this return message, gives the trader a memorandum showing the trade and the price to which his margin carries it. (Rec., 68.)

When the trader desires to close a trade thus opened, the correspondent in like manner receives and transmits over this wire to the Hammond Company at Hammond, the trader's order to "close" the trade, giving in this telegram the number already given to the trade. This order is "filled" at Hammond in the same way as the opening order. (Rec., 42.)

Each trade is received, numbered, transmitted and closed separately. No two trades are combined. On the books of the Hammond Company and the correspondents, and in all telegrams passing between them, each trade is treated as a separate one, and is, and always can be, identified by the number given to it at the start. (Rec., 219.) The name of the trader is not furnished to, nor entered upon the accounts of, the Hammond Company; but the master is inaccurate in saying that the company "has no way of identifying him." In the traders ledger account upon the correspondent's books his trades are entered by their numbers. (Rec., 123, 124.) Thus the company can identify

the other party in each of its trades and every trader can, by the number, trace and identify each of his trades in the books of the Hammond Company.

Each of these initial orders is in terms to "buy" or "sell" one of the numerous stocks, whose prices are quoted in these quotations, except the few that relate to grain. (Rec., 82.) This is also true of the orders to close trades. If the original order is to "buy" stocks, the closing order is to "sell" the same quantity of the same stock, the telegram adding "to close number ....," giving the number given at the outset of the trade. (Rec., 42, 43.)

The profit or loss on each transaction to the trader is the difference between the buying price and the selling price, minus or plus the "commission" hereinafter mentioned. (Rec., 138.) Except as modified by the deduction of the commission, the profit of the trader measures the loss of the Hammond Company, and *vice versa*. The correspondent does not get any of this profit, nor, except under the guaranty hereinafter stated, incur any of this loss. (Rec., 223.) The trade is not considered closed, nor is the trader paid any profit, until the correspondent is notified from Hammond that the closing order is accepted. (Rec., 101, 130.)

The arrangement also contemplates that the correspondent shall at all times keep the open trades of those who trade through his office adequately margined. Thus the correspondent assumes the burden and responsibility of collecting from each of his traders the required margin at the opening of the trade and such further margins, from time to time, as

a change in the market price may require. As a result the Hammond Company has no personal concern with the amount of margins actually collected by the correspondent from traders.

Accordingly the Hammond Company, as soon as each trade is accepted, charges against the correspondent, on account of that trade, a regular margin of $10 for each ten shares of stock, or 1,000 bushels of grain, and another like margin, whenever, by the adverse course of the quotations, the first margin is exhausted, and this is repeated, as often as the price of the stock in the quotations reaches the point, to which the already deposited margins carry the trade. (Rec., 220,222.)

This imposes upon the correspondent not only the burden of collecting the margins from his traders, as he does, but also that of determining when a trader's deal shall be terminated for his failure to deposit the requisite margin. The manner of doing this is for the correspondent to write out a similar telegraphic order to close the trade, and send it over the wire (Rec., 70, 84); and it is filled in the same way and is followed by a like reply from the Hammond Company accepting the order (Rec., 72) as when the customer himself, as above stated, orders his trade closed.

The trader is charged a so-called "commission" of $2.50 upon each ten shares of stock. (Rec., 220.) All trades are in lots of ten shares or multiples thereof. Of this $2.50, the correspondent receives four-fifths, and the Hammond Company one-fifth. The correspondent pays the expenses of his own office. He also pays the Hammond Company $50 per month, which the corre-

spondents testify is "for the use of the wire." (Rec., 87, 114, 145.) This four-fifths of the aggregate of the commissions, less said expenses, is all that the correspondent gets out of the business. As already explained, he receives none of the profits of the transactions.

The method of carrying out the business is as follows: Each day the Hammond Company enters on the debit side of a statement (for form see Rec., 196, 200), opposite the number of each trade opened that day, a charge (for margins) of $10, if the trade is, as are the majority (Rec., 152), for ten shares, and if for more, then $10 for each ten shares thereof. (Rec., 220, 222.) This statement is mailed on the evening of that day, and the correspondent upon its receipt the next morning (Rec., 96), deposits in a certain bank, designated by the Hammond Company, in his city the debit balance shown (Rec., 220, 94-96), and sends to that company a duplicate deposit slip (Rec., 153). A telegram signed by the bank,—but usually written out by the correspondent—is also sent to the Hammond Company, notifying it of the deposit of the money. (Rec., 153, 182.)

When any trade is closed out, as above stated, with a profit to the trader, this profit plus the margin collected on the trade, is entered on the credit side of this daily statement opposite the number of the trade. If the closing of the trade has resulted in a loss to the trader, it is deducted from the margin charged against, and collected on, that trade as aforesaid and the balance, if any, is carried to the credit side of the statement. One-fifth of the commissions on these closed trades (of that day) is charged on the

debit side under the name of "wire service." If the amounts thus entered as credits on the daily statements exceed these debits, the Hammond Company accompanies the statement with its check, payable to the correspondent, for the net credit balance, unless the amount is small, when it is carried into the next day's statement. If these debit items of a day's statement aggregate more than these credit items, the correspondent the next day deposits in the bank at his city, to the credit of the Hammond Company, this debit balance, and notifies the Hammond Company as above stated. Thus the balances of accounts, as between the correspondent and the Hammond Company, are practically settled the next day. (Rec., 221.)

These margins become the profits of the Hammond Company to the extent that the trades are closed at a profit to it. If trades result in profits to the traders, the Hammond Company pays them their profits (its losses) by remitting these in this one check to the correspondent, who distributes them among the winning traders.

It is through this system of daily accounts that the *Hammond Company* collects the *full* margins ($10 on each 10 shares of stock) on these trades, and also pays the traders its losses to them. This is all done through the correspondent.

It is also a significant fact, that in the first instance, the Hammond Company, through these statements, collects, and until the closing of the trade retains, the entire commission, and upon the closing of these trades pays the correspondent his share of it.

Each trade is closed at a price that will realize the entire commission. (Rec., 190.) In other words, if the customer orders a trade for ten shares of stock, and deposits $10 margin, and does not follow it by the deposit of further margin, the trade is closed out at a market price, $7.50 away from the opening price, leaving $2.50 commissions, fifty cents of which the Hammond Company retains by charging it as a debit on these statements, when the trade is closed (Rec., 143, 149), under the name of "wire service", and the balance ($2), it pays through these statements to the correspondent.

The foregoing fully describes the *method* by which the great bulk of the business in these Illinois offices is conducted and the trades are opened and closed. (Rec., 43, 106, 129, 147.)

In the two Illinois offices, to which the evidence relates, practically no business is conducted except that of collecting these orders and sending them to the Hammond Company. No other concern has a wire running into these offices. All their business goes to the Hammond Company (Rec., 108), except in the case of Battle & Dickes, who have bought some shares of stock *for investment* through other persons. (Rec., 152.)

The evidence does not satisfactorily disclose the volume of business of either of these offices. Mr. Dickes gave as his opinion, that the business that his firm sent to the Hammond Company would not average one thousand shares a month, most of which was divided into ten and twenty share lots (Rec., 152); and Mr. Babb declined to give an estimate of the volume of

his business. (Rec., 102, 103.) As, however, this business justifies the expense of maintaining these private wires, the fair inference is that its volume is large. Indeed, the secretary of the Hammond Company testified (Rec., 44), that Battle & Dickes sent them orders daily and Babb did nearly every day.

The foregoing facts appear without contradiction or conflict in the evidence. The only witnesses on this subject were Babb, Battle and Dickes, appellee's correspondents, and Williams, its secretary.

The main objection to the master's report rests (1) upon its omission of some facts—probably because the master deemed them merely evidentiary—which are essential to an understanding of the nature of this business, and (2) its failure always to distinguish between the facts and the master's conclusions. Some of its statements, which are but his conclusions, are liable to be mistaken for a recital of *facts*.

The real question then is, whether these undisputed facts show that, at the time of the service of process, the Hammond Company was, in contemplation of the law, transacting business in Illinois through these correspondents as its agents, so as to make service upon either of them a valid service upon it.

This is not to be determined by the *form*, which the parties have very adroitly attempted to give to the business and their relation to it. The Hammond Company concedes that its aim and purpose has been to escape being subject to suit in Illinois, and that, as the master's report says (Rec., 224), "it has endeavored so to arrange and conduct its business as to avoid such a contingency."

Its reason for this doubtless lies in the fact that, under an Illinois statute enabling one losing at gambling to recover from the winner the amount lost (Ill. R. S., ch. 38, sec. 132), its Illinois traders may recover from it their losses.

But the question is, what is the *real* relation of these parties to each other and to the business. In

Italian-Swiss Colony v. *Pease*, 194 Ill., 98,

where service upon an agent of a foreign corporation was unsuccessfully attacked, the court said (106):

"The appointment of an agent need not be proven by direct testimony that the principal, by affirmative words, constituted him his or its agent. The appointment may be established by implication of law arising out of the conduct of the parties, or by way of estoppel. We see no reason why this implication or estoppel will not arise as well in favor of one who seeks to serve the process of the courts on the agent as in favor of one who seeks to bind the principal by the acts and contracts of the agent." In

Conn. Mut. Ins. Co. v. *Spratley*, 172 U. S., 602, 615,

this court, in sustaining service on a foreign corporation, said:

"In such case it is not material that the officers of the corporation deny that the agent was expressly given such power, or asserted it was withheld from him. * * * In the absence of any express authority, the question depends upon a review of the surrounding facts and upon the inferences which the court might properly draw from them."

Any other view would enable foreign corporations to enjoy the benefits, while escaping the burdens, of transacting business in another state.

In order, then, to see the situation in its real light, the subterfuges, to which the Hammond Company and

its correspondents resort in order to put a false front upon it, need to be considered.

1. The statements of account daily sent out by the Hammond Company contain the statement: "We have no agents," and the agreement between the correspondent and the Hammond Company is to the same purport. (Rec., 200.) But whether these correspondents are such agents as may be served "is to be determined by all the facts and circumstances of the case, and not by the mere fact that none of them has been named as such agent." (*Norton* v. *Atchison R. R.*, 61 Fed., 620.)

The weight to be given to this recital in the statement may be gauged by another recital in these written statements, as follows (Rec., 200):

"We solicit and will receive no business except with the understanding that the actual delivery of all property bought from us, or sold to us, is in all cases contemplated and understood."

A similar protestation is found in their agreement. Compare this provision with the undisputed testimony in this record, that, as the master finds (Rec., 222), practically *all* orders to "buy" or "sell," sent by these correspondents to the Hammond Company, are in fact closed, not by delivery, but by countertrades and the settlement of the differences in prices.

Thus the appearance sought to be given by these recitals is that the Hammond Company is conducting a legitimate business of buying and selling stocks, when in reality it is conducting a bucket shop. Were this the issue before this court, would it accept this recital and disregard the reality? Certainly not.

Why, then, should the real situation be disguised by the dubbing of these Illinois representatives as "correspondents" and these recitals that they are not "agents"?

2. Another misleading misnomer is the word "commissions." Usually, if not always, a commission implies an agency. As applied to transactions upon a regular commercial exchange, it is the compensation, which the member of the exchange (the broker) receives from his principal for executing in the open market of the exchange his principal's orders. It was doubtless this that led the bucket shops to give this name to the sum which they exact from their traders.

But the relation between such a concern and its traders is in no sense that of principal and agent. It is that of two principals. Nor is the so-called commission in reality one. This is well brought out in *Smith* v. *Western Union Tel. Co.*, 84 Ky., 664, where the court said (italics ours):

"The evidence tends strongly to show that the appellant, at the time complained of, was not a grain and provision merchant, but was the keeper of a bucket shop, which is described as a place where grain, provisions, etc., are posted on blackboards as they come in on the ticker. *The shop buys or sells indifferently*, and always at the price appearing for the time being on the blackboard. Should a customer wish to make a deal in June wheat, say buy one thousand bushels, he sees the last quotation, say one dollar per bushel; he gives the shop the margin, say one cent on the bushel or ten dollars; *the shop charges a fixed commission*, say one-quarter of a cent per bushel; the shop does not notify the customer of the fluctuations of the market, but he looks out for that on the blackboard. Wheat on the next quotation goes down, say three quarters of a cent; this loss of three- quarters of a

cent, added to one-quarter of a cent *charged for commission,* makes one cent per bushel on one thousand bushel, or ten dollars. This exhausts or "freezes" out the margin, the deal is closed, and the shop has made ten dollars. On the other hand, should wheat advance one cent per bushel, the customer would make one cent per bushel less one-quarter of a cent per bushel, *the commission,* and the shop would lose three-quarters of a cent per bushel."

Another case illustrating this is

Central Stock & Grain Exchange v. *Board of Trade,* 196 Ill., 396.

The leases of the telegraph wires in this record (Rec., 203, 217), show that the present appellee, the Hammond Company, is the successor of the appellant in that case. They were originally made to the Central Stock & Grain Exchange *of Chicago,* appellant in the above case. Some of the counsel for that appellant are also counsel for the Hammond Company in the present record. After that decision, the Central Stock and Grain Exchange became the Central Grain and Stock Exchange *of Hammond,* Indiana, and subsequently the Hammond Elevator Company, the appellee here, the latter succeeding to the offices and business of the former. (Rec., 36.)

The first of these companies maintained its main office in Chicago, and in that suit—a bill in equity, through which that company sought to retain the quotations of appellant—the character of its business was involved, and the Illinois Appellate Court denied it the quotations, because it was a bucket shop, and the Supreme Court affirmed that decision. The report of the case in the Appellate Court, which more

fully sets forth the facts (98 Ill. App., 212), will show that the office of the "correspondent" was there present also; that the "commissions" were charged at the same rate, and divided between the correspondent and the principal concern in the same proportion as shown here. The latter's portion of it was in that case, however, called not "wire service," but (page 222 of 98 Ill. App.) "the proportion of the commission."

But the feature in that case, to which this court's attention is specially called, is that this "commission" (figured at the same rate), was collected by the bucket shop in that case *at its main office,* where the trade was directly between it and its traders, and without the intervention of any correspondent. As disclosed by the printed abstract of record in that case (at p. 234), one Max Bass, in testifying to transactions directly with the Central Stock & Grain Exchange at its office in Chicago, said:

"They do not charge me a commission that I know of. If I understand it rightly, I have an agreement with them to pay them one-sixteenth *for the privilege of trading with them* in the grain and produce market. That is, one-sixteenth in addition to trading at the market with them. On stocks it is $25 on one hundred shares."

Adolph Flick and Harry Pagan, other witnesses, testified to the same effect. (Abstract of Record in that case, 128, 230, 234.)

The only purpose of thus referring to the record in that case is, to bring out just what, in this kind of business, this word "commission" really means, and to show that it is not a compensation by a principal to an agent, but measures the advantage, which the bucket-shop exacts in the trade, or, as expressed by some,

it is the sum paid by the trader for the privilege of making the bet. This is shown by the fact that the *same sum* is exacted, whether the two principals in the bet meet directly or through the medium of the "correspondent." In a transaction between two principals it is a misnomer to speak of a "commission."

It will thus be seen that this "commission" is but a part of the false front, that is intentionally given to this business, and that the master erred in treating it as signifying that the correspondent was the agent of the *trader*.

On the contrary, it shows that the Hammond Company charges all its traders—as do all bucket-shops—a regular percentage, by way of advantage, upon its trades, and, in order to compensate these agents who gather business for it in Illinois, for their services, it pays them, instead of a regular salary, four-fifths of its "commissions" on the business they send, out of which they are required to pay their office expenses. They are no less agents of the Hammond Company because their compensation is graduated upon the amount of the business they gather, instead of being a fixed salary. (*Cone* v. *Tuscaloosa Co.*, 76 Fed.,891.)

This is emphasized by the manner of collecting these "commissions." As already shown, they are collected from the trader as a part of the margin he pays, and *are transmitted in their entirety immediately upon the opening of the trade, to the Hammond Company,* which retains them, until the trade is closed, when it pays the correspondent his agreed proportion.

3. This also exhibits another misnomer, which

deterred the master from seeing this situation in its real light. We refer here to the term "wire service" —the name *now* applied in this business to that portion of the commissions paid by the trader, which is retained by the Hammond Company. That company's predecessor, the Central Stock & Grain Exchange, and its correspondents, did not, as already shown, call this by this name, but accurately spoke of it as the bucket-shop's "proportion of the commission." Indeed, at times in this case Babb called it "a commission on trades I make with them" and a charge "for doing business." (Rec., 107.)

Is it, then, in reality, as the master finds (Rec., 225), a compensation for the *use of the wire,* or is it the proportion which the bucket-shop, in dealing with its agents, retains out of the commission? To this the record furnishes but one answer. If it were in reality a charge for the use of the wire, it would naturally be based upon the actual use made of the wire. But a telegram covering a trade of one thousand shares of stock makes no greater use of the wire than one of ten shares; yet the charge for this so-called wire service in the former is one hundred times that charged in the smaller trade.

So, if it were in reality a charge for wire service, the longer the wire the greater would be the charge. But as disclosed in this case, the shorter wire (that of Battle & Dickes, at Aurora) has the larger charge. (Rec., 51.)

Again, each of these correspondents, as already stated, pays the Hammond Company $50 per month "for the use of the wire." It is therefore unduly tax-

ing credulity to expect one to believe that this second charge is rightly named, or is in reality, a further charge for wire service.

4. Another pretense, that the master regarded as material in determining the relations of these parties, is that part of the contract between the Hammond Company and its correspondents, which characterizes the relation between them as that of principals. But is it not perfectly apparent from the mere statement of the course of business that the correspondent is in no sense a principal?

There is, as the master in effect finds (Rec., 225), no independent trading *between the correspondent and the trader.* Instead of accepting the order of the trader when tendered, the former transmits it over the wire, and the trader has no trade, until the return message, accepting the offer, is received by the correspondent. Again, the customer's order is earmarked by a number, and this identity of the trade is preserved from start to finish in all the accounts.

Nor is the relation of the correspondent to the Hammond Company that of two principals. The only apparent ground for claiming this is that the orders are forwarded to that company in the name of the correspondent. But the making of the contract in the name of an agent does not eliminate the real principal, although thereby the agent doubtless does also become liable on the trade. The legal attitude of such an agent is that of a *del credere* agent. That is really what the correspondent is.

There is but one trade, and to one trade there can be but two principals. Those principals here are the

Hammond Company and the trader. The loss of one is the gain of the other, and *vice versa*. The fact that neither the profit nor the loss is the correspondent's, demonstrates that he is in no sense a principal. Indeed the correspondent regards the trade he forwards, not as his trade, but that of the trader. (Rec., 106, 155.)

If not a principal, he must be an agent of one or the other, or both, of these principals. Which is he? To an individual trader his relation is casual and occasional. To the Hammond Company it is continuous and permanent. He not only receives and forwards the trades, but collects from the traders the margins exacted by the Hammond Company, and deposits them for that company in a local bank. If a trade requires further margin, he collects this also, and transmits it to the company in the same way. If, on the termination of the trade, there is anything in margins or profits to be paid by the company to the trader, the correspondent is also the agency, by which this is done. This is not an occasional, but a daily, occurrence.

In other words, the correspondent is the vehicle or instrument, by which the Hammond Company continuously gathers these trades in Illinois, collects these margins (which are in some cases its profits), and pays to its winning traders the money which constitutes its losses to them.

When, therefore, the false front, which the Hammond Company has attempted to give to this situation by the misuse of names and phrases, is pushed aside, and it is viewed in its real light, it is seen that a cor-

poration, with its principal place of business in Indiana, desires to gather business from different cities in Illinois, and to that end it leases and controls private telegraph wires running from its place of business to cities in Illinois; that, to induce persons to act as its agents for this purpose in these cities, it agrees, in lieu of a fixed salary, to compensate them by a certain percentage of the business they send, out of which they are to pay their office expenses; that this percentage is established at four-fifths of the regular charge, which, under the misnomer of "commissions," the Hammond Company and like institutions charge all their customers for the privilege of trading; that the Hammond Company, desiring to conduct this business on a strictly cash basis, requires each agent to collect from traders through his office all margins in advance, and to make good to the Hammond Company any default in doing so; that the service rendered by the agent is not only the gathering and forwarding of these trades, but the collection from the traders, and transmission to the Hammond Company, of its margins, including the *full* charge for the privilege of trading, or "commission", with it, and also the disbursement by the correspondent of any moneys or return margins this company may owe the traders.

When thus rightly understood, can there be any doubt that the Hammond Company is *doing business* in Illinois through these correspondents as its agents?

Under these circumstances, will public policy permit that company to claim that these correspondents are not its agents, and thus enable it to enjoy the privileges of extending its business into Illinois, without incurring a corresponding liability to be sued there?

Second. What, then, is *the law* applicable to these facts?

To constitute a legal service of *mesne* process on a corporation of another state (1) the writ must be personally served, within the jurisdiction, upon its officer or agent, and (2) the company must, within the contemplation of the law, be doing business within the state.

(1) As a foreign corporation enters a state only by comity and not by right (*Paul* v. *Virginia*, 8 Wall., 168), the State of Illinois lawfully might pass, as it has done, the following statute (Rev. Stat., ch. 32, sec. 26):

"Foreign corporations, and the officers and agents thereof, *doing business in this state*, shall be subjected to all the liabilities, restrictions and duties that are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers." * * *

The general law of Illinois, under which Illinois corporations of like character with the Hammond Company are organized, provides (Rev. Stat. Ill., ch. 32, sec. 5) that they "may sue and *be sued*," and in defining the manner, in which a home corporation may be sued, another Illinois statute (ch. 110, sec. 5) provides:

"An incorporated company may be served with process by leaving a copy thereof with its president if he can be found in the county in which the suit is brought, if he shall not be found in the county, then by leaving a copy of the process with any clerk, secretary, superintendent, general agent, cashier, principal, director, engineer, conductor, station agent or any agent of said company found in the county."

This statute, in authorizing service of process upon

any agent, as it does (see *C. & R. I. R. R.* v. *Fell*, 22 Ill., 333), differs from the statutes of some states, which require service upon the "general," or "managing," or "business," agent.

This statute applies to foreign corporations.

Midland Pac. Ry. Co. v. *McDermid*, 91 Ill., 170.

Liability to be sued and served like a home corporation, is one of the liabilities that Illinois, by said section 26, imposes upon foreign corporations as a condition of doing business in the state. In

Wilson Packing Co. v. *Hunter*, 8 Biss., 429 (approved by this court in *Barrow Steamship Co.* v. *Kane*, 170 U. S., 100),

a suit in chancery involving service in Illinois, Judge Drummond expressly so held.

By availing itself of the privilege of doing business in a state, a foreign corporation impliedly assents to be there sued and served in the mode provided by the state statute, provided this does not violate the fundamental principle that requires notice of a suit before a party can be bound by it.

St. Clair v. *Cox*, 106 U. S., 350.
Railroad Co. v. *Harris*, 12 Wall., 65, 81.
Ex parte Schollenberger, 96 U. S., 369.
Merchants Mfg. Co. v. *Grand Trunk Ry. Co.*, 13 Fed., 358.

In *Merchants Co.* v. *Grand Trunk Railway Company*, *supra*, Judge Wallace said:

"At common law, process must be served on its principal officer within the jurisdiction of the sovereignty where the corporate body exists. But it can waive this

requirement and consent to be served in a different manner, and when it does this it stands on the same footing with a natural person. When it avails itself of the privileges of doing business in a state whose laws authorize it to be sued there by service of process upon an agent, its assent to that mode of service is implied. Accordingly, it has been repeatedly held that a foreign corporation consents to be amenable to suit by such mode of service as the laws of the state provide, when it invokes the comity of the state for the transaction of its affairs."

Under these two Illinois statutes any foreign corporation doing business in Illinois is in the attitude of those foreign insurance corporations, which are required by state law to designate some *particular person*,—frequently a state official, in no way connected with the transaction of its business,—as an agent for service. Service of process on such an agent is always recognized by the federal courts.

In an *action at law* in the federal court in Illinois a service according to this statute upon any foreign corporation doing business within the district, would be sufficient, because service of process is within section 5 of the Act of Congress of June 1, 1872 (R. S., sec. 914), which declares that "the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be," to that existing in the state courts.

Amy v. *Watertown,* 130 U. S., 301.

This principle is not shaken by *Barrow Steamship Co.* v. *Kane,* 170 U. S., 100, which holds only that a

state statute relating to service on a foreign corporation cannot be allowed to *restrict the jurisdiction* of the federal courts by limiting service of process on foreign corporations to suits based upon causes of action *arising within the state.*

Nor is *Amy* v. *Watertown, supra,* modified by *Shepard* v. *Adams,* 168 U. S., 618, which holds only that the words, "as near as may be," in section 914, *supra,* reserve to the federal courts a certain discretion in requiring conformity with state practice, under which they might sustain service of process under a rule conforming to a statute, in force when the rule was adopted, although the statute was subsequently changed.

But conformity with a state law providing a mode of service upon foreign corporations, when it does not restrict federal jurisdiction, seems required by a more general principle, which is applicable as well to *chancery* and *admiralty* suits, as to common law cases. This principle does not exclude any other method of service the federal courts may adopt, even in a class of cases not covered by the state statute, but does require that a service under such statute shall be deemed sufficient.

This is the principle, already mentioned, that a foreign corporation, by availing itself of the comity of a state to transact business therein, must be conclusively presumed to have assented to the mode of service of process prescribed by the state law, provided it is not so unreasonable as to infringe upon "due process of law."

No sound reason can be suggested why this should

not apply to *all* suits in the federal court. (*Ex parte Schollenberger,* 96 U. S., 376.) Otherwise the theory of federal jurisdiction based upon diverse citizenship would be violated.

Besides, if service under the state law is good enough in common law cases, why not also in a chancery or admiralty suit?

This view is sustained by the decisions. Thus, it is held in admiralty suits,—which, like equity cases, are not within the statute requiring conformity with the state practice,—that service upon a foreign corporation under the state law is sufficient.

In re Louisville Underwriters, 134 U. S., 488.
Doe v. *Springfield B. & M. Co.,* 104 Fed., 684.

In chancery cases service of process under the state law is sustained.

Connecticut Ins. Co. v. *Spratley,* 172 U. S., 602.
Evansville Courier Co. v. *United Press,* 74 Fed., 918.
McCord Lumber Co. v. *Doyle,* 97 Fed., 22; 38 C. C. A., 34.

(2) The other requisite of a legal service is that the foreign corporation must be doing business within the state.

St. Clair v. *Cox,* 106 U. S., 350.
Connecticut Ins. Co. v. *Spratley,* 172 U. S., 615.

What, then, is a sufficient "doing business" within the state?

Connecticut Ins. Co. v. *Spratley*, 172 U. S., 602.

There a foreign insurance company had once solicited business in a state, but had ceased to do so and had withdrawn its soliciting agent before process was served. It still had, however, some policy holders residing within the state, who paid their premiums to an agent located without its borders. An agent of the company went into the state specially to investigate a claim under one of its policies, and while there was served with process, and this court sustained the service, holding that "the company was doing business in the state."

See also

In re Hohorst, Petitioner, 150 U. S., 653,

where service upon a foreign steamship company was sustained, when made upon a firm which rented and maintained in New York in its own name an office where the usual monetary transactions of the corporation were transacted by the firm as the agents for the company. Whether the compensation of the firm was a percentage of the business done does not appear from the report.

The weight of authority is, that a corporation which merely solicits business or orders for merchandise, as commercial houses do through drummers, is not doing business within a state, so as to warrant service of process upon the solicitor. But the only province of the drummer is to take orders from the customer and mail them to his house for its acceptance. He neither receives the acceptance of the order, nor delivers it to the customer, nor collects or disburses the moneys in-

volved in the transactions. Nor does he maintain an office in the state.

But the rule is otherwise, as decided by Judge Lacombe in *Cone* v. *Tuscaloosa Co.*, 76 Fed., 891, where the selling agent resides in the state, the goods are sent to him, and he sells on a commission and guarantees the solvency of the purchasers. So in

Block v. *R. R. Co.*, 21 Fed., 529,

Mr. Justice Brewer held that a railroad company, which did not operate its railroad in a state, but had there an office for the purpose of soliciting business and also an agent there employed to further the transaction of its business in the state where its road ran, was subject to service of process on such agent.

Denson v. *Chattanooga, etc., Assn.*, 107 Fed., 777.

There a Tennessee Loan Association, whose sole business was loaning its funds to stockholders on real estate security, had no local office or agent in Alabama, but sent there a traveling agent, whose business was to solicit subscriptions to its stock and to obtain applications for loans and submit the same to the home office. At the solicitation of such agent a resident of Alabama signed an application for stock in the association, and an application for a loan on the security of such stock and a mortgage on real estate in Alabama. The applications were forwarded to the home office, where defendant's board of directors directed the stock to be issued and the loan to be made. A note and trust deed were then prepared at the home office and sent with the stock to

the agent. At the same time a check of the association on a Tennessee bank in favor of the applicant, was sent to another resident of Alabama, with instructions to him to deliver the check to the applicant, when he should have executed and delivered the note and trust deed. The note was dated in Tennessee and payable at the home office. The Circuit Court of Appeals (5th Circuit), held this was doing business in Alabama in violation of a statute of that state prohibiting it, except on certain conditions, with which the association had not complied, saying that "all the business of loaning money to Denson, with the single exception that the association in Tennessee said, 'Yes,' was transacted in the State of Alabama."

That case is like the one at bar, except that it related to a single transaction, while here the transactions were of daily occurrence for a long period.

A quite similar case is

U. S. Saving & L. Co. v. *Miller*, 47 S. W., 17.

See also,

Van Dresser v. *Oregon R. & N. Co.*, 48 Fed., 202.

Palmer v. *Chicago Herald Co.*, 70 Fed., 886.

Locke v. *Chicago Chronicle Co.*, 107 Iowa, 390.

Furthermore the Hammond Company is transacting business in Illinois, because its bets with these traders are *Illinois contracts.* While each trade requires the acceptance of the Hammond Company in Indiana, the offer does not become a completed trade, nor is it treated as such, until the acceptance is re-

ceived in Illinois. While there is no direct evidence on this point, it is apparent from the whole situation that if, intervening the times that the order is sent in and the reply is received in Illinois, the trader should fail to pay his margin, and the correspondent for this reason should wish to call the trade off, he is at liberty to do so. This is probably the reason, why the time when the acceptance gets back to the Illinois office is taken "as the time when the order is filled." This in itself fixes the time when, the negotiation becomes a contract, and shows that these trades are Illinois transactions.

This is also apparent for another reason. Doubtless an offer becomes a contract, as soon as the acceptance is committed to the regular mail, or a telegraph company. But, according to the better reasoned cases, the rule is otherwise when the acceptor commits his acceptance to his own agent or an agency within his control.

In re London & Northern Bank, L. R. (1900), 1 Chcy. Div., 220.

Thayer v. *Middlesex Mut. Fire Ins. Co.,* 27 Mass., 325.

Bryant v. *Booze,* 55 Ga., 438.

Within this principle the wire, over which the acceptance passes to the Illinois office, is within the control of the Hammond Company.

Especially should this principle apply, where the parties themselves fix as the time when the transaction shall become a contract, as they do here, the time when the return message reaches its destination.

The case is then analogous to the insurance cases,

which hold that, when an application for insurance is signed in one state and forwarded to the home office of the company in another, where the policy is issued and mailed back to the applicant's state, to a person, other than the applicant, to be there delivered to the applicant—especially where the policy provides, that it shall not take effect until the first premium is paid—it is a contract of the state of the applicant, despite recitals in the policy seeking to make it a contract of the state of the company's home office.

Equitable Life Assurance Soc. v. *Clements,* 140 U. S., 226, 232.

Wall v. *Equitable Life Assurance Soc.,* 32 Fed., 273.

Hicks v. *National Life Ins. Co.,* 60 Fed., 690; 9 C. C. A., 215.

Equitable Life Assurance Soc. v. *Winning,* 58 Fed., 541; 7 C. C. A., 359.

Berry v. *Knight Templars,* 46 Fed., 439.

Fletcher v. *New York Life Ins. Co.,* 13 Fed., 526.

Mut. Ben. Life Ins. Co. v. *Robison,* 54 Fed., 580.

In *Wall* v. *Equitable Life Assurance Society, supra,* Justice Brewer, in holding an insurance policy a Missouri contract, said:

"The defendant is a New York corporation doing business in the state of Missouri; the insured was a citizen and resident of Missouri, and made his application here, which was forwarded to New York; the application was accepted, the policy fully prepared and signed in that state, and sent to Missouri, and delivered to the applicant here. By the terms of the

policy, all premiums are payable at the defendant's office in New York. If the sum insured should become payable, the payment is to be made at its office in New York."

In *Equitable Life Assurance Soc.* v. *Winning, supra,* the Circuit Court of Appeals of the 8th Circuit, said:

"As the assured was a resident of Saline county, in the state of Missouri, at the time he became insured, and as the policy was delivered in that state, and the first premium was there paid, the contract evidenced by the policy is a Missouri contract."

In the *Berry* case, *supra,* the court said:

"It is said the policy is an Illinois contract, and to be construed by the laws of that state. But clearly this is not so. The company established an agency, and carried on its business, in this state [Missouri]. It was through that agency the assured, who was a citizen and resident of the state, made his application and received his policy. The fact that the policy was signed by the officers of the company in Chicago has no significance. It was transmitted to the company's agent in Missouri, who received the premium, called, in this case, an 'entrance fee,' and delivered the policy to the assured, at his home in this state, and it took effect at that place and from that date. * * * In such cases the company cannot, by any contrivance or device whatever, evade the effect and operation of the laws of the state where it is doing business."

In the *Fletcher* case, *supra,* Judge Treat, in holding the contract a Missouri contract, said:

"It may be that the formal acceptance of the proposed contract was, by the *letter* of the contract, to be consummated in New York. The broad proposition, however, remains, no artifice to avoid which can be upheld. The statutes of Missouri, for salutary reasons, permit foreign corporations to do business in the state on prescribed conditions. If, despite such conditions, they can by the insertion of clauses in their policy

withdraw themselves from the limitations of the Missouri statutes, while obtaining all the advantages of its license, then a foreign corporation can by special contract upset the statutes of the state and become exempt from the positive requirements of law. Such a proposition is not to be countenanced. The defendant corporation chose to embark in business within this state under the terms and conditions named in the statute. It could not by paper contrivances, however specious, withdraw itself from the operation of the laws, by the force of which it could alone do business within the state."

So the "paper contrivances," already referred to, by which the Hammond Company, while transacting this extensive business through these Illinois offices, has attempted to escape liability for suit in that state, should not be successful.

Ransome v. *State*, 91 Tenn., 716.

That was an indictment under a criminal statute prohibiting betting on horse races outside of the enclosure of the race track, and it appeared that the defendant maintained at Chattanooga, Tennessee, a place called the "Turf Exchange," where he took orders for bets and telegraphed them to a bookmaker upon a race track at another place, the customer paying ten cents on each order in addition to the amount bet. The defendant settled with the bookmaker once a week, giving a statement of all the business. The odds offered by the bookmaker were posted in this turf exchange, from which a telegraph wire ran directly to the track. The card furnished each better read: "Commission Office. No betting done or permitted here." The court held, however, that the betting was done in Chattanooga, and sustained the indictment.

These trades being, then, Illinois transactions, the Hammond Company was, at the time of service, engaged in transacting business extensively in that state.

It also follows, that, as these correspondents were the only agencies through which this company transacted this business in Illinois, they must be held agents upon whom service may be made, because (1) the Illinois statute authorizes a service upon *any* agent, and (2) they are the *only* persons within the state, upon whom service could be made, *there being no officers of the company, or other kinds of its agents within the state.* (Rec., 34, 35.) Were this otherwise, the anomaly would be presented of a corporation extensively engaged in transacting business in the state without being subject to suit and service there.

It remains to call attention to two direct authorities upon the particular question at bar. The first of these—one "on all fours" with the case at bar—is

Boyd Co. v. *Coates*, 24 Ky. L. R., 730.

That was a case brought against a concern of the same kind as the Hammond Company, having its headquarters at St. Louis. It moved to quash the service of summons upon its "correspondent" in Kentucky, upon the ground that he was not its agent, but the court said:

"To sustain this motion the defendant introduced as a witness James E. Boyd, who testified that he was the president of the Boyd Commission Co.; that it was a foreign corporation, engaged in dealing in stocks on the New York market, and in grain and provisions on the Chicago market; that the defendant company had no agents, but did have correspondents, of

which R. L. Carter was one; that his company had paid the Western Union Telegraph Co. to put a private wire into the office of Carter in Clinton, which connected with the office of the company in St. Louis, Mo., and for the rent of which wire they paid $41 per month, which they sublet to Carter; that Carter would transmit over this private wire orders obtained by him for the purchase of the stock of various kinds, for which he charged one-fourth of one per cent. commissions on all deals made with customers; that the company, as Carter's agent, bought these stocks on the market and gave Carter one-half the commission, and kept the other half; that all commissions collected by Carter were deposited by him to the credit of the company in the Clinton Bank; and that they checked out to Carter the amount due by him from the moneys so deposited; that they paid all losses incurred upon these deals and appropriated all the profits arising therefrom except the commission paid to Carter. * * * We are of opinion * * * that Carter was the agent of appellant company; and that the service was properly had upon him under section 51 of the Code."

That the business there was of the same character as the business here, is further shown by the statements of the opinion that the trades were in lots of ten shares of stock, upon which $10 was put up as margin, out of which $2.50 was taken as a commission, and the trade automatically exhausted, when the market went against the trader $7.50 from the opening price.

The other case, which relates to the same kind of business, is *Central Stock & Grain Exchange* v. *Bendinger,* 109 Fed., 926; 48 C. C. A., 726.

The appellant in that case was, as already shown, the predecessor of appellee, the Hammond Company, and it was represented by the same firm of attorneys, as appears in this record for the Hammond Company.

That suit was brought by a *cestui que trust* against that appellant, whose principal place of business was in Chicago, to recover trust funds paid as margins by her trustee (one Stichenoth) to the correspondent (Forbus & Co.) of the Central Exchange at Cincinnati. The method of conducting the business was identical with that shown here, as will appear from the following extract from appellant's brief in that case (pp. 16, 17, 22):

"For this purpose, and to carry on the business, M. S. Forbus & Co. maintained an office in Cincinnati, furnished and equipped it with their own means, employed whatever help might be necessary, and paid all the expenses of managing and conducting their office, and then held themselves out to the trading public as ready to take their business.

A leased or private wire was used between the office of M. S. Forbus & Co. and the office of the appellant in Chicago, for which Forbus & Co. paid a rental to the appellant, the appellant paying a rental therefor to the Western Union Telegraph Company.

Customers who dealt with Forbus & Co. deposited or paid them whatever sum Forbus & Co. required upon any trades to be made, and Forbus & Co. treated said sums so paid to them as belonging to said Forbus & Co. and not to the appellant. If it became necessary for Forbus & Co. to pay out any money to their customers, the same was paid out of the funds of Forbus & Co. and not out of those of the appellants. The funds of Forbus & Co. were not commingled with the funds of the appellant in any way. Forbus & Co. were responsible to the appellant for any trades made or placed with the appellant. At the end of each day's business, an account was stated between Forbus & Co. and the appellant, from which the balances due either to or from Forbus & Co. and the Central Stock & Grain Exchange were ascertained, and Forbus & Co. remitted any balance due the appellant by placing the

same to the credit of the Central Stock & Grain Exchange in a bank in Cincinnati. And if any balances were due from the appellant to Forbus & Co. the appellant remitted the same by its check to Forbus & Co. * * *

The money alleged to have been paid by William Stichenoth to M. S. Forbus & Co. was merged in the account of M. S. Forbus & Co., and the same was used by M. S. Forbus & Co. in paying any losses which they sustained with their other customers, and any losses sustained by William Stichenoth were paid by M. S. Forbus & Co. from money which said Forbus & Co. received from their other customers. * * * Stichenoth himself * * * had no dealings directly with the Central Stock & Grain Exchange. * * * All of Stichenoth's transactions were with Forbus & Co. * * * Therefore it cannot be found from the testimony that the Central Stock & Grain Exchange received the money which Stichenoth claimed he placed with Forbus & Co. Whatever sum was received by the Central Stock & Grain Exchange from Forbus & Co. was in fact Forbus & Co.'s money, and no one else's."

But the Circuit Court of Appeals of the Seventh Circuit sustained a recovery against the Central Exchange, on the ground that Forbus & Co. were its agents, and that the transactions, upon which the money was paid to these correspondents were "bucket-shop" transactions, and hence that, as the trust moneys had not reached a *bona fide* holder for value without notice of the trust, it could be recovered from the Central Exchange.

We note in that record also that, while exactly the same division of commissions was made as here, the Central Exchange's part of it was not there called "wire service," but was spoken of as its share of the commissions.

It would thus seem apparent, that in this case, if before it. that court would hold that these correspondents are the agents of the Hammond Company.

It is therefore respectfully submitted that the Hammond Company, at the time of service, was transacting business in Illinois; that its correspondents served with process were its agents; that service upon them as such was service upon it, and that this case ought to be reversed and remanded.

HENRY S. ROBBINS,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 215.

BOARD OF TRADE OF THE CITY OF CHICAGO,
APPELLANT,

v.

HAMMOND ELEVATOR CO. ET AL., APPELLEES.

ADDITIONAL AUTHORITIES.

The following authorities hold that, where a foreign corporation has failed to designate a person to receive service of process in compliance with a statute requiring it, service may be made upon some other proper agent:

Foster *v.* Charles Lumber Co., 5 So. Dak., 57.
Hagerman *v.* Empire State Co., 97 Pa. St., 524.
Clews *v.* Rockford R. R. Co., 49 How. Pr., 117.
Funk *v.* Anglo-American Ins. Co., 27 Fed., 336.
American Co. *v.* Beasley, 116 Fed., 256.
Mutual Reserve Ass. *v.* Cleveland Mills, 82 Fed., 508 (C. C. A., 6th cir.).
Modern Woodmen *v.* Noyes, 158 Ind., 503.
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Respectfully submitted.

HENRY S. ROBBINS,
Counsel for Appellant.